AHMAD BIN UDOH & ANOR. v. NG AIK CHONG

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) September 19, 1969]

[Penang—Federal Court Civil Appeal No. X. 43 of 1969]

Contract — Illegality — Void — Whether moneys paid recoverable — Padi Cultivators (Control of Rent and Security of Tenure) Ordinance, 1955, ss. 3(1) & 16 — Contracts (Malay States) Ordinance, 1950, ss. 24, 25 & 66.

The respondent in 1965 entered into an agreement with the appellants for a lease of padi land for a period of 6 years at an annual rent of $250 and pursuant thereto the respondent paid the appellant $1,500 being six years rent in advance. The agreement provided that if the respondent should be prevented from cultivating the land then the sum of $1,500 should be returned to the respondent. On the appellants subsequently refusing to allow the respondent to till the land the respondent commenced proceedings to recover the said sum of $1,500. In the court below the learned judge ([1969] 2 M.L.J. 116) dismissed the appellants' contention that as the agreement was void *ab initio* for illegality under section 3(1) of the Padi Cultivators Ordinance the respondent could not recover the sum paid. The learned judge held that as the illegal purpose had not been achieved the respondent was entitled in view of section 66 of the Contracts (Malay States) Ordinance to a refund of the money paid. On appeal,

Held, dismissing the appeal: since the facts and circumstances of the case as found by the learned trial judge proved that the parties were ignorant that they were executing an illegal agreement, section 66 of the Contracts (Malay States) Ordinance would apply and accordingly the respondent was entitled to the return of the deposit.

Per Suffian F.J.: In the instant case there is no evidence that the plaintiff was *in pari delicto* and that he knew when he entered into the agreement that it was forbidden by law, the illegality of the agreement was discovered subsequent to the making of it, the claim for restoration of his money is not based on the illegal contract but dissociated from it and his action is not founded on dealings which are contaminated by illegality.

Cases referred to:—

(1) *Harnath Kaur* v. *Inder Bahador Singh* 50 I.A. 69.

(2) *Budhulal* v. *Deccan Banking Co.* A.I.R. 1955 Hyd. 69, 74, F.B.

(3) *Sivaramakrishnaih* v. *Narahari Rao* A.I.R. 1960 Andh. Pra. 186.

The following authorities were also cited in argument: *Snell* v. *Unity Finance Ltd.* [1963] 3 All E.R. 50; *Pollock & Mulla* on Indian Contract and Specific Relief Acts, 8th Edn. pp. 158, 389, 390 and 392; *Taylor* v. *Bowers* (1876), 1 Q.B.D. 291, 298 (line 5); *Bigos* v. *Boustead* [1951] 1 All E.R. 92, 95; *Tan Bing Hock* v. *Abu Samah* [1968] 1 M.L.J. 221; *St. John's Shipping Corporation* v. *J. Rank Ltd.* [1956] 3 All E.R. 683, 687; *Archbold Ltd.* v. *S. Spanglett Ltd.* [1961] 1 All E.R. 422, 3rd line onwards; *Mash & Murrell Ltd.* v. *Joseph I. Emanuel Ltd.* [1961] 1 All E.R. 487; *Inderjit Singh* v. *Sunder Singh* A.I.R. 1969 Raj. 155; *Jahed Shaikh* v. *Kamalesh Chandra* A.I.R. 1959 Cal. 165; *Bijey Singh* v. *Bhawani Singh* A.I.R. 1953 All. 365; *Krishna Menon* v. *Narayanna Ayyar* A.I.R. 1962 Ker. 21; *Ram Singh* v. *Jethanand Wadhumal & Co.* A.I.R. 1964 Raj. 232; *National Chamber of Commerce* v. *Nitya Nanda* A.I.R. 1963 All. 294; *Abki Singh* v. *Daso Bhogta* A.I.R. 1952 Pat. 455, 456, 552; *Krishna Rao* v. *Kodandarama* A.I.R. 1960 Andh. Pra. 190; *Dharmeshwar* v. *Union of India* A.I.R. 1955 Assam 86; *Dyaviah* v. *Shivamma* A.I.R. 1959 Mys. 188; *Gurunadha* v. *B. Rosaiah* A.I.R. 1959 Andh. Pra. 277; *Virraya* v. *Subba Rao* A.I.R. 1959 Andh. Pra. 647; *Kedar Nath* v. *Prahlal Rai* A.I.R. 1960 S.C. 213; *Purkayastha* v. *Union of India* A.I.R. 1955 Assam 33; *Song Bok Yoong* v. *Ho Kim Poui* [1968] 1 M.L.J. 56; *Uttamchand* v. *Mohandas* A.I.R. 1964 Raj. 50; *Kishangarh Municipality* v. *M.K. Mills Ltd.* A.I.R. 1961 Raj. 6; *Aswini Kumar* v. *Union Territory, Tripura* A.I.R. 1969 Tri. 69; *Abdul Shukor* v. *Hood Mohamed* [1968] 1 M.L.J. 258.

FEDERAL COURT

R.C. Murugason for the appellants.

Karpal Singh for the respondent.

Cur. Adv. Vult.

Azmi L.P.: This is an appeal against the judgment of the High Court at Alor Star dismissing the defendants' appeal against the judgment of the Sessions Court at Alor Star under which the defendants were ordered to return to the plaintiff $1,500 being rent for the cultivation of padi land.

Under an agreement executed by the parties, the defendants agreed to lease out their padi land under S.P. Nos. 15408 and 24189 to the plaintiff for the years 1965 to 1970 at an annual rent of $250 and on the execution of the agreement received the 6 years' rent in advance amounting to $1,500. The agreement was drafted by a layman and in the colloquial Malay language. It is provided among other things that if the plaintiff should be prevented from cultivating the land the defendants must return the advance.

The sessions court gave judgment for the plaintiff and ordered the defendants to return the advance. The defendants appealed to the High Court at Alor Star and the said court dismissed the appeal on the ground of illegality.

Section 3 of the Padi Cultivators (Control of Rent and Security of Tenure) Ordinance 1955 provides that no tenancy agreement for the cultivation of padi shall be for a term of less than one season or more than one year and section 16 provides that any contravention of any provisions of the Ordinance is an offence.

Before the High Court it was argued on behalf of the defendants that the agreement was void and unenforceable because it contravened the provisions of the Padi Cultivators (Control of Rent and Security of Tenure) Ordinance 1955 and that the plaintiff was *in pari delicto* with the defendants on the ground that the plaintiff based his claim on the said agreement.

The learned judge in his judgment quite rightly decided that he should consider the question of illegality of the agreement though it was not raised in the court below. But he came to the conclusion that both parties were completely unaware of the provisions of section

3. The learned judge considered section 66 of the Contracts (Malay States) Ordinance 1950 and came to the view that the agreement was one which was covered by the words "if discovered to be void" in section 66 of the Contracts (Malay States) Ordinance. He applied the ruling of the Privy Council in *Harnath Kaur v. Inder Bahador Singh*[1]:—

"An agreement, therefore discovered to be void is one discovered to be unenforceable by law and on the language of the section would include an agreement that was found in that sense from its inception as distinct from a contract that becomes void."

He also came to the view that the illegal purpose had not been achieved and that the question as to whether the parties were *in pari delicto* did not arise and he thereupon dismissed the appeal.

The question that has to be decided in this appeal is first whether the money paid by the plaintiff to the defendants under the agreement may or may not be recovered back by the plaintiff under section 66 of the Contracts (Malay States) Ordinance by reasons of the provisions of sections 24 and 25 of the said Ordinance.

Section 66 provides:—

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

Sections 24 and 25 read as follows:—

"24. The consideration or object of an agreement is lawful, unless:—

(a) it is forbidden by law; or

(b) it is of such a nature that, if permitted, it would defeat the provisions of any law; or

(c) it is fraudulent; or

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

25. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void."

I see no reason why I should interfere with the learned judge's finding of fact that both parties were completely unaware of section 3 of the Padi Cultivators (Control of Rent and Security of Tenure) Ordinance 1955 and that therefore they were executing an illegal agreement.

In *Harnath Kaur v. Inder Bahador Singh* their Lordships of the Privy Council explained the provisions of section 65 of the Indian Contract Act (corresponding to our section 66) in these words:—

"The section deals with (a) agreements and (b) contracts. The distinction between them is apparent from section 2. By clause (c) every promise and every set of promises forming the consideration for each other is an agreement, and by clause (h) an agreement enforceable by law is a contract. Section 65, therefore, deals with (a) agreements enforceable by law and (b) with agreements not so enforceable. By clause (g) an agreement not enforceable by law is said to the void.

An agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and, on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void."

It is important for the purpose of this judgment to note from the above passage that an agreement "discovered to be void" for the purpose of that section includes an agreement that was void in that sense from its inception.

It is convenient also to note now that under section 24 of the Contracts (Malay States) Ordinance an agreement of which the object or consideration is unlawful is void. This case was argued before the High Court on the basis that the object or consideration was unlawful and therefore void for that reason. It was however, urged before us that the said agreement being void by reason of illegal consideration does not come under section 66. Counsel relied on a passage at pages 390 and 391 of *Pollock & Mulla* Indian Contract and Specific Relief Acts 8th Edition, which reads as follows:—

"It seems on the whole that the present section does not apply to agreements which are void under section 24 by reason of an unlawful consideration or object, and still less to those which are tainted with fraud or other moral turpitude, and there being no other section in the Act under which money paid for an unlawful purpose may be recovered back, the analogy of English law will be the best guide. If the illegal purpose or any material part of it has been performed the money paid cannot be recovered back, for then the parties are equally in fault, and *in pari delicto melior est conditio possidentis.*"

This view was criticised in *Budhulal v. Deccan Banking Co.*[2]

In that case Jaganmohan Reddy J. with whose judgment three other judges expressed agreement, in reference to the passage quoted above said this:—

"Reliance is placed on behalf of the defendant-applicant on the observations of the eminent writers *Pollock & Mulla* in their treatise on Indian Contract and Specific Relief Acts, 7th Edn., pages 346 and 347 to the effect that section 65, Indian Contract Act does not apply to agreements which are void under section 24 by reason of an unlawful consideration or object and there being no other provision in the Act under which money paid for an unlawful purpose may be recovered back, an analogy of English law will be the best guide. The reasoning is that if the view of the Privy Council is right namely that 'agreements discovered to be void' apply to all agreements which are *ab initio* void including agreements based on unlawful consideration, it follows that the person who has paid money or transferred property to another for an illegal purpose

can recover it back from the transferee under this section even if the illegal purpose is carried into execution and both the transferor and transferee are *in pari delicto*.

In our opinion, the view of the learned authors is neither supported by any of the subsequent Privy Council decisions nor is it consistent with the natural meaning to be given to the provisions of section 65. The section by using the words 'when an agreement is discovered to be void' means nothing more nor less than: when the plaintiff comes to know or finds out that the agreement is void. The word 'discovery' would imply the pre-existence of something which is subsequently found out and it may be observed that section 66, Hyderabad Contract Act makes the knowledge (*Ilm*) of the agreement being void as one of the prerequisites for restitution and is used in the sense of an agreement being discovered to be void. If knowledge is an essential requisite even an agreement *ab initio* can be discovered to be void subsequently. There may be cases where parties enter into an agreement honestly thinking that it is perfectly legal agreement and where one of them sues the other or wants the other to act on it, it is then that he may discover it to be void. There is nothing specific in section 65, Indian Contract Act or its corresponding section of the Hyderabad Contract Act to make it inapplicable to such cases.

In other words 'There may be cases where parties enter into an agreement honestly thinking that it is a perfectly legal agreement and where one of them sues the other or wants the other to act on it, it is then that he may discover it to be void. There is nothing specific in section 65, Indian Contract Act or its corresponding section 66 Hyderabad Contract Act to make it inapplicable to such cases. If facts and circumstances in the case prove that the parties discovered the illegality subsequently and not at the time of entering into the agreement, section 65 Contract Act, would become applicable'."

I find the reasoning of the court in the above judgment with respect, sound. In the circumstances I would therefore express agreement with the view that since the facts and circumstances of the case as found by the learned trial judge proved that the parties were ignorant that they were executing an illegal agreement, section 66 of the Contracts (Malay States) Ordinance would apply and that therefore the plaintiff was entitled to the return of his advance. I would therefore dismiss the appeal with costs.

Suffian F.J.: With respect I agree that this appeal be dismissed.

The facts in this appeal are almost on all fours with the facts in *Sivaramakrishnaih v. Narahari Rao.*[3] There the plaintiff sold some padi to the first defendant. The first defendant failed to pay the price and the plaintiff sued for it. The defence was that at the time of the sale there were Ordinances in force which permitted sale of food-grains only to persons holding a licence and that, as the first defendant was not a licensed dealer, the contract was unenforceable against him and consequently the plaintiff could not recover the price claimed by him. The plaintiff replied that he was not aware that the first defendant had no licence to buy padi, that in fact the latter represented to him that he had a licence and that he acted upon his representations. The trial court found that the first defendant had no licence and that the plaintiff was unaware of this. The trial court held that the plaintiff could recover. This judgment was upheld on appeal.

Chandra Reddy C.J., after saying that contracts or agreements entered into in violation of the Ordinances were illegal and void from their inception and therefore are unenforceable, said at page 188:

"This leads us to the question whether a party, who is not *in pari delicto* is prevented from claiming the money he paid to the other party, who is guilty of fraud; in other words, does the illegality of the transaction stand in the way of the plaintiff's recovering what he had paid under the illegal contract or agreement; this has to be answered with reference to the terms of section 65 of the Indian Contracts Act [corresponding to our section 66].

It is manifest that in order to invoke this section, the invalidity of the contract or agreement should be discovered subsequent to the making of it. This cannot be taken advantage of by parties who knew from the beginning the illegality thereof. It only applies to a case where one of the parties enters into an agreement under the belief that it was a legal agreement, i.e., without the knowledge that the agreement is forbidden by law or opposed to public policy and as such illegal.

The effect of section 65 is that, in such a situation, it enables a person not *in pari delicto* to claim restoration since it is not based on an illegal contract but dissociated from it. That is permissible by reason of the section because the action is not founded on dealings which are contaminated by illegality. The party is only seeking to be restored to the *status quo ante*."

In the instant case there is no evidence that the plaintiff was *in pari delicto* and that he knew when he entered into the agreement that it was forbidden by law, the illegality of the agreement was discovered subsequent to the making of it, the claim for restoration of his money is not based on the illegal contract but dissociated from it and his action is not founded on dealings which are contaminated by illegality.

By contrast the first defendant's conduct was thoroughly dishonest. His written defence in the sessions court was a bare denial. There was clear evidence by the plaintiff that, when his man was ploughing the padi field, the first defendant stopped him and that on 7th June, 1966, he snatched the written agreement from the plaintiff's control and ran off with it.

In these circumstances it would be scandalous were the defendants allowed to keep the plaintiff's money. They should return it.

The defendants' appeal is dismissed with costs.

Ali F.J. concurred.

Appeal dismissed.

Solicitors: *R.C. Murugason; Raja Mohamed Redzuan bin Raja Yaacob.*